No. 79-6777

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GARY KEITH STEAGALD,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ELDRED WALLACE, JEANNIE WALLACE, JOHN DeBIASE AND ELIZABETH DeBIASE, IN SUPPORT OF PETITIONER, *AMICI CURIAE*

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## INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonprofit organization of over 200,000 persons, dedicated to defending and protecting the rights enumerated in the Constitution. The ACLU has had a special interest in

maintaining the fundamental protection offered to individuals by the Fourth Amendment against government intrusion into their homes. ACLU attorneys have appeared in this Court, either directly or for *amici,* in many of this Court's Fourth Amendment cases.

Against the arguments of those who contend that police officers should have broad discretion in determining when the privacy rights of citizens are to yield, the ACLU has long argued that the warrant requirement of the Fourth Amendment is the only meaningful safeguard for the citizen's right of privacy. We believe that the ACLU's experience in Fourth Amendment cases can be of substantial assistance to the Court as it decides whether the requirements of the Amendment were followed in this case.

Eldred and Jeannie Wallace and John and Elizabeth DeBiase are the respondents in *King v. Wallace,* No. 80-503, currently pending in this Court on petition for writ of certiorari. Counsel for *Amici Curiae* here is counsel of record for respondents in that case. The question presented in *King v. Wallace* is identical to the question presented here. Respondents Wallace and DeBiase, in a motion filed concurrently with their brief, have requested that the Court consolidate *King v. Wallace* with this case for all further proceedings. To date, the Court has not acted on their motion.

The Wallaces and DeBiases are homeowners in Fairfax County, Virginia, whose houses were searched under a police policy identical to the one which is the subject of this case. Their claims against the police officers were asserted, however, not in the course of a criminal prosecution -- no contraband or illegal activity was discovered in respondents' homes -- but in a civil rights suit against the Fairfax County Police Department. Any decision in this case should take into account and protect the Fourth Amendment privacy rights of similarly situated, uninvolved third parties who may be subjected to searches such as the one here.

## SUMMARY OF ARGUMENT

The Framers of the Fourth Amendment wished to secure to the citizen the right of privacy in his home; their means to that end was the institution of the search warrant, which interposed the judiciary between the citizen and arbitrary police power. The federal agents in this case insist upon a distinction, for Fourth Amendment purposes, between searching for things and searching for persons in a house, arguing that in the latter category of cases, when in possession of an arrest warrant, they need not obtain a search warrant describing the premises to be entered in search of their suspect. This distinction makes no sense, however, for two reasons.

First, the invasion of the privacy of a citizen's home is unaffected by the object of the policeman's search. Second, the Fourth Amendment preference for judicial rather than police determinations of probable cause for searches is no less forceful because the intended search is for persons rather than things. The Fourth Amendment requires that, absent exigent circumstances, a search of particular premises must be based upon the determination of a judge or magistrate that there is probable cause to believe that the object of the search -- whether "person" or "thing" -- is within the premises to be entered. Only in the course of such a determination can the privacy of citizens in their homes be appropriately weighed against the interest of the government in seizing evidence or apprehending suspects.

## ARGUMENT

**THE FOURTH AMENDMENT REQUIRES THAT POLICE OFFICERS OBTAIN A WARRANT DESCRIBING THE PLACE TO BE SEARCHED BEFORE ENTERING AND SEARCHING THE PRIVATE HOME OF A THIRD PARTY IN AN ATTEMPT TO EXECUTE AN ARREST WARRANT, EVEN WHERE THE OFFICERS HAVE PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT NAMED IN THE WARRANT IS IN THE PREMISES, ABSENT CONSENT OF THE HOMEOWNER OR EXIGENT CIRCUMSTANCES.**

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment by its terms prohibits "unreasonable searches" and does not specify when search warrants must be obtained. Nevertheless, it is settled doctrine that the Amendment requires a policeman to obtain a warrant "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched" before he may enter a private dwelling and seize a "thing". *Agnello v. United States,* 269 U.S. 20, 33 (1925); *Jones v. United States,* 357 U.S. 493, 497 (1958). The issue presented by this case is whether an officer must also obtain a warrant "particularly describing the place to be searched" before entering a third party's home for a search aimed at the seizure of a "person" named in an arrest warrant.

This Court has never decided this issue. In 1958, the Court characterized it as a "grave" constitutional question, but refused to rule on it because it was not fairly presented on a record which was interpreted as involving a search for goods. *Jones v. United States, supra,* at 499-500. Since that time, the question has surfaced but it has never been directly confronted.[1] This case presents the issue simply and squarely.

The Federal narcotics agents in this case perceived and acted upon a distinction between searching for people and searching for objects in a house, although their basis for differentiating between the two types of searches does not appear in the record.[2] Consistent with that distinction, they searched the residence of third parties for their suspect, Ricky Lyons, on the basis of an outstanding warrant for his arrest, but applied to a magistrate for a search warrant specifically describing the premises in order to seize packets of suspected cocaine discovered in the course of their search for Lyons.

*Amici* submit that there is no rational ground consistent with the purposes of the Fourth Amendment for a rule permitting entries and searches for persons but not for tangible objects. The Amendment's terms do not differentiate between searches for persons and things, and the Amendment protects the security of citizens

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[1] *See* Payton v. New York, No. 78-5420, United States Supreme Court (April 15, 1980) (Slip Opinion at 10); United States v. Watson, 423 U.S. 411, 418, at n.6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113, at n.13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-481, *reh. denied,* 404 U.S. 874 (1971).

[2] It will be assumed, for purposes of this brief, that the agents were relying for their actions upon the rule enunciated in United States v. Cravero, infra.

in their "persons, homes, papers, and effects" without distinction.

Our position is firmly rooted in the principles of the Fourth Amendment.[3] The protection we seek is not founded upon some novel theory of jurisprudence which a more humane society might have incorporated into its Bill of Rights; rather, we invoke the very protection that the Framers of the Fourth Amendment intended to provide, namely, protection against general warrants which sanction wholesale invasions of private homes and subject the citizenry to a police system armed with unfettered discretion.

We start with the incontrovertible proposition that the basic policy of the Fourth Amendment is to secure to the citizen the right of privacy in his home. The landmark case of *Boyd v. United States,* 116 U.S. 616, 630 (1886), stated the point simply and forcefully:

> [The principles of the Fourth Amendment] apply to all invasions, on the part of the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.

It is clear, moreover, that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts. *See, e.g., United States v. Martinez-Fuerte,* 428 U.S. 543, 561, 565 (1976) ("the sanctity of

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[3]The fundamental protections of the Fourth Amendment are guaranteed by the Fourteenth Amendment against invasion by the states. Wolf v. Colorado, 338 U.S. 25, 27 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23, 33 (1963).

private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." "Private dwellings involve 'strong Fourth Amendment interests that justify the warrant requirement.'"); *South Dakota v. Opperman,* 428 U.S. 364, 367 (1975) ("Less rigorous warrant requirements govern [automobile searches] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." (Footnote omitted.)); *Silverman v. United States,* 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Coke, Third Institute 162 (1644) ("A man's house is his castle.").

The history of the Fourth Amendment supports the conclusion that its principal attack was against general warrants. That the Amendment was adopted in response to the abuses which had been committed by governmental authorities under general warrants has been documented repeatedly. *Boyd v. United States, supra,* at 624-625; *Frank v. Maryland,* 359 U.S. 350, 363-366, 376-377 (1959); *Marcus v. Search Warrant,* 367 U.S. 717, 714-729 (1061); *Stanford v. Texas,* 379 U.S. 476, 481-484 (1965). In *Stanford v. Texas, supra,* the Court, in discussing the origins and purpose of the Fourth Amendment, observed:

> Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law,

> that ever was found in an English lawbook, because they placed 'the liberty of every man in the hands of every petty officer.'" 379 U.S. at 481.

Although the American and English experiences with general warrants differed in some particulars, the essential vice of these warrants was seen to be the same–the blanket authority given to police officers by a single warrant to enter and search numberless homes, trampling the right of privacy of their inhabitants. It is our contention that the warrant for the arrest of Ricky Lyons had this same fatal characteristic.

The solution adopted by the Framers of the Bill of Rights to keep "the liberty of every man" out of "the hands of every petty officer" was the institution of the search warrant, which interposed the judiciary between the citizen and arbitrary police power. The rationale of the search warrant was stated plainly by Justice Douglas in *McDonald v. United States*, 335 U.S. 451, 455-456 (1948):

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizens and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing and history shows that the police acting on their own cannot be trusted. So the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to

> that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that exigencies of the situation made that course imperative.

The constitutional preference that determinations of probable cause for searches be conducted by disinterested judicial officers rather than by interested police officers was also articulated in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), in Justice Jackson's familiar words:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime....* When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[4] (Emphasis added.)

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[4] *See also,* United States v. Lefkowitz, 285 U.S. 452, 464 (1932): [T]he informed and deliberate determinations of magistrates empowered to issue warrants...are to be preferred over the hurried actions of police officers...who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

Today it is well settled that a search warrant is required for the search of a private home, subject to established exceptions.[5] The exceptions which this Court has enumerated in the past can generally be classified as involving the search of a moving vehicle, justified by its mobility. *See, e.g., Carroll v. United States,* 267 U.S. 132 (1925); search incident to arrest, justified in order to protect the officer or to prevent destruction of evidence immediately at hand. *See, e.g., Chimel v. California,* 395 U.S. 752 (1969); and an exception which the Court has recognized to date only in dictum for searches developing under extraordinary or "exceptional" circumstances. *See, e.g., Warden v. Hayden,* 387 U.S. 294 (1967); *Schmerber v. California,* 384 U.S. 757, 770-771 (1966); *see generally, Johnson v. United States, supra,* at 15.

While the police may urge this Court to support warrantless arrest entries under a standard of general reasonableness, the validity of the reasonableness test itself is extremely doubtful. *United States v. Rabinowitz,* 339 U.S. 56 (1950), in which that theory reaches its fullest development, has been only twice reaffirmed by the Supreme Court and was finally overruled in *Chimel v. California, supra,* at 768. *Chimel* is significant to the inquiry here for several reasons. The standard of necessity which the Court adopted there can be viewed as a general watershed for all exceptions to the warrant requirement. Noting that the Fourth Amendment's requirement of reasonableness must be read in light of its

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[5] Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Mancusi v. DeForte, 392 U.S. 364, 370 (1968); Katz v. United States, 389 U.S. 347, 357 (1967); Rios v. United States, 364 U.S. 253, 260 (1960); Jones v. United States, 357 U.S. 493, 499 (1958).

history and purpose, the Court, in overruling *Rabinowitz,* concluded "we cannot...excuse the absence of a search warrant without a showing by those who want exemption from the constitutional mandate that the exigencies of the situation made that course imperative." 395 U.S. at 761, citing *McDonald v. United States, supra.*[6]

Considerable precedent other than *Chimel* supports the proposition that necessity is the proper standard to use in determining whether circumstances are sufficiently extraordinary to permit an exception to the warrant requirement. This Court's past application of the notion of exceptional circumstances indicates that the key to excusing a warrant has been a finding that an immediate search was necessary. *See, e.g., Johnson v. United States, supra; McDonald v. United States, supra; United States v. Jeffers, supra.* In all three cases, the Court invalidated a warrantless search for want of exceptional circumstances.

In *Chambers v. Maroney,* 399 U.S. 42 (1970), this Court reemphasized that necessity is the proper standard to use in determining whether circumstances will permit an exception to the warrant requirement:

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule,

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[6]The burden here, of course, is upon the police to show the legality of their practice:

> [t]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking [an] exemption [from the requirement] to show the need for it...Chimel v. California, supra, at 762, quoting United States v. Jeffers, 342 U.S. 48, 51 (1951).

> it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. *Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization.* 399 U.S. at 51. (Emphasis added.)

*Johnson, McDonald* and *Jeffers* implicitly grounded the exigent circumstances exception, to the extent that it was recognized in those cases, on a finding that a warrantless search by police was imperative if the purpose of the search was not to be frustrated. These cases have been cited repeatedly by the Supreme Court as precedent for determining other exceptions to the warrant requirement. *See, e.g., Mancusi v. DeForte, supra; Katz v. United States, supra.* Moreover, in the only three cases in which the Court has excused a warrantless search, other than one incident to an arrest or of a moving vehicle, it emphasized the imperative nature of the search. *See, e.g., Terry v. Ohio,* 392 U.S. 1 (1968) ("'stop and frisk' for weapons"); *Warden v. Hayden, supra* (hot pursuit); *Schmerber v. California, supra* (compulsory blood test incident to arrest); *but cf. Sibron v. New York,* 392 U.S. 40, 62-66 (1968). Taken as a whole, these cases indicate that the constitutionality of warrantless arrest entries turns on whether they take place under circumstances of substantial necessity which preclude recourse to judicial channels.[7]

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[7] For a fuller discussion of this point, *see* Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349 (1974); Note, *The Neglected Fourth Amendment Problem in Arrest Entries,* 23 Stanford L. Rev. 994 (1971).

Recently, in *Payton v. New York*, No. 78-5420, United States Supreme Court (April 15, 1980) (Slip Opinion), the Court considered the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant of any kind to make a routine felony arrest. It held these statutes unconstitutional, and specified that an arrest warrant would be required, absent exigent circumstances, to enter the home of a suspect to seize him. Specifically not addressed in *Payton* was the issue presented here. Nevertheless, in reasoning to its conclusion, the Court presented an analysis of the purpose and development of the Fourth Amendment which leads inexorably to its conclusion in this case.

The Court noted at the outset that "the simple language of the Amendment applies equally to seizures of persons and to seizures of property." Slip Opinion at 12. It went on to observe that

> As the Court unanimously reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. Slip Opinion at 12.

After examining the development of the common law in respect to a constable's authority to make warrantless arrests, and after noting that

> The common law sources display sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repitition of the adage that a "man's house is his castle" was one of the most vital elements of English liberty. Slip Opinion at 23-24.

The Court concluded:

> If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe that the suspect is within. Slip Opinion at 29.

The holding in *Payton* was clearly grounded upon a view that evidence of a citizen's participation in a felony, sufficient to support the issuance of a warrant for his arrest, would outweigh that person's interest in maintaining the privacy of his *own* home, and that the search of *his* house is therefore reasonable within the meaning of the Fourth Amendment. But the authority of such a warrant is "limited". Evidence of a suspect's involvement in crime has, of course, no bearing on the reasonableness of an entry to search for him into the home of presumptively innocent third parties, whose privacy interests were never considered when the arrest warrant issued.

The United States Courts of Appeals for various circuits have expressed differing views on this issue. The Third, Fourth and District of Columbia Circuits have adopted the language and reasoning of *Chambers v. Maroney, supra,* in concluding that police officers may not, consistent with the Fourth Amendment, enter the home of third parties in search of a suspected offender for whom they have a valid arrest warrant, even where they have probable cause to believe that the suspect will be found on the premises, unless the search takes place under exigent circumstances.

In *Fisher v. Volz,* 496 F.2d 333 (3d Cir. 1974), the Court of Appeals addressed the issue which this case presents.

Initially, it is worth noting that *Fisher,* like *Wallace v. King, infra,* was a suit under 42 U.S.C. § 1983 against the Newark police, and not a criminal prosecution in which the Fourth Amendment issue was raised in the course of a motion to suppress evidence, as was the case in the decisions of most other Courts of Appeals considering this question. The court in Fisher reasoned as follows:

> *A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home. Permitting reliance by the officer solely on exigent circumstances offers too many opportunities for abuse, provides little comfort to a citizen peacefully in his home, and affords insufficient protection against invasions of his privacy.* A requirement that the officer must also have probable cause to believe that the suspect is in the dwelling will not unduly restrict the effectiveness of the police action but will reduce the obvious risks of abuse. 496 F.2d at 341. (Emphasis added.)

The Court held:

> [P]olice officers may not constitutionally enter the home of an innocent citizen in search of a suspected offender for whom they have a valid arrest warrant, even under exigent circumstances, unless they also have probable cause to believe the suspect will be found on the premises. 496 F.2d at 341-342.

*See, also, Government of the Virgin Islands v. Gereau,* 502 F.2d 914 (3d Cir. 1974), *cert. denied,* 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975).

In *United States v. Ford,* 553 F.2d 146 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit reviewed its opinions in the last decade dealing with this

question and clarified its policy in light of decisions which had been rendered in the intervening years by other Circuits. The Court in *Ford,* citing *Chambers v. Maroney, supra,* indicated that the D.C. Circuit has adopted essentially the same view of this issue as have the Third and Fourth Circuits: that is, that the Fourth Amendment requires both probable cause and exigent circumstances to justify a warrantless search of third party premises. *United States v. Ford, supra* at 159, n.45.

The latest Court of Appeals decision on this point is that of the Fourth Circuit in *Wallace v. King,* No. 78-1399 (July 1, 1980).[8] The Fourth Circuit's decision in *Wallace* was held in abeyance pending this Court's ruling in *Payton v. New York, supra,* and it is the only Circuit decision to take *Payton* into account. The Wallaces and their co-plaintiffs are homeowners in Fairfax County, Virginia, whose houses were searched by police seeking to apprehend a young woman who had failed to appear at a scheduled court hearing. In a relatively brief opinion, citing *Fisher v. Volz, supra,* and *Payton* for its authority, the court held that the defendant police officers could not, consistent with the Fourth Amendment, enter the home of third parties in search of a suspected offender for whom they had a valid arrest warrant, even though the officers had probable cause to believe that the suspect would be found in the premises, since the searches in question did not take place under exigent circumstances.

Other Circuits have approached this issue without directly ruling on it. All of the Courts of Appeals have agreed that, at a minimum, there must be probable cause to believe that a suspect for whom the police have a warrant is within a particular dwelling before the police may enter it to search. *See, e.g., Rice v. Wolff,* 513 F.2d 1280, 1291-1292

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[8] This case is currently on petition to this Court for writ of certiorari, as King v. Wallace, No. 80-503.

(8th Cir.), *reversed on other grounds, sub. nom., Stone v. Powell*, 428 U.S. 465 (1976). In that case, the Court found that the police did not have probable cause for their search and it did not reach the issue of urgent need.

Three Circuits have declared that something less than a showing of both probable cause and exigent circumstances can justify warrantless searches of third party premises. In *United States v. McKinney,* 379 F.2d 259 (6th Cir. 1967), in the context of a motion to suppress evidence, the Court held that probable cause to believe that a fugitive was in a third party's house authorized F.B.I. agents with an arrest warrant for the suspect to search the house for him. The Court in *McKinney* appears to have relied upon *United States v. Rabinowitz, supra,* in so holding. 379 F.2d at 263, n.3. As was pointed out above, *Rabinowitz* was overruled by *Chimel v. California, supra,* two years after the decision in *McKinney,* 395 U.S. at 768. Interestingly, in response to the defendant's argument in *McKinney* that exigent circumstances must also be shown, the Court there made the curious rejoinder in dictum that "there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant." 379 F.2d at 263. Whether that Court would so hold as a matter of law is not clear.

*United States v. Cravero,* 545 F.2d 406 (5th Cir. 1976), upon which the Court of Appeals in this case relied for its ruling, involved a Justice Department prosecution of multiple defendants for conspiracy to import cocaine and marijuana.[9] The Court, in its initial decision (it rendered a second decision on rehearing), ruled with the

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[9] In United States v. Harper, 550 F.2d 610 (10th Cir. 1977), the Court of Appeals for the Tenth Circuit followed United States v. Cravero, infra, to hold that where federal drug enforcement agents had reasonable grounds to believe that a fugitive for whom an arrest warrant had been issued was staying at a certain address, those agents lawfully used the arrest warrant to gain entry to the residence.

Third and District of Columbia Circuits in holding that both probable cause and exigent circumstances were necessary to support a warrantless search of third party premises. In the course of its first opinion, the Court discussed the considerations which had led to this conclusion:

> A search warrant would be required, in the normal case and absent some exception, to enter a residence to search for a stolen pet or other object seen carried into it. *We are unable to see a distinction valid for Fourth Amendment purposes between entry to search for such an object and entry to apprehend a guest. Consequently, logic demands that the rules governing searches should apply with equal force to an arrest entry into a third party's home.* If the policeman has probable cause to believe that a suspect he wishes to arrest is inside the home, he can demonstrate this to a magistrate and obtain a search warrant for the suspect. If he fails to obtain a warrant, then an arrest entry without a search warrant will be permissible only if exigent circumstances or some other established exception to the warrant requirement obtains. Any other result raises the spectre of police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe that the suspect may be concealed. 545 F.2d at 415-416. (Footnotes omitted.) (Emphasis added.)

On a petition for rehearing, the Court reversed its earlier decision. 545 F.2d 420. The reason for its so doing–which is not entirely clear from the language of the second opinion–involves the panel's having "overlooked" prior law in the Fifth Circuit bearing on this issue, which held that where a police officer has a valid arrest warrant in his possession, and reasonably believes that its subject

is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect.[10]

The Fifth Circuit Court of Appeals in *Cravero*, in its second opinion in that case, and the Sixth Circuit in *McKinney*, failed to take into account the language and reasoning of this Court in *Chambers v. Maroney, supra,* and *Chimel v. California, supra,* upon which the opinions of the Third and District of Columbia Circuits are grounded. None of these courts had the benefit of this Court's decision in *Payton v. New York, supra.* It is important, in any event, to bear in mind that the precedents followed by the Court in *Cravero* employed the discredited "reasonableness" test of *United States v. Rabinowitz, supra,* as did the Court in *McKinney.*

The federal agents in this case have insisted upon a distinction, for Fourth Amendment purposes, between searching for things and searching for persons subject to arrest, and have urged that a search warrant is unnecessary in the latter class of cases. It is this contention which, *Amici* submit, is truly novel. There are two reasons why this purported distinction cannot be squared with the Fourth Amendment.

First, the invasion of the privacy of a citizen's home is unaffected by the object of the policeman's search. As this Court pointed out in *Payton v. New York, supra,* in responding to the observation of the New York Court of Appeals that a substantial difference exists in the relative obtrusiveness of an entry to search for property and an entry to search for a person:

> It is true that the area that may legally be searched is broader when executing a search

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[10] United States v. James, 528 F.2d 999 (5th Cir. 1976), and Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), *cert. denied,* 412 U.S. 953 (1973).

warrant than when executing an arrest warrant in the home. *See Chimel v. California, supra.* This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrests.

*But the critical point is that any differences in the obtrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home.* The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home–a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses ...shall not be violated." (Emphasis added.) Slip Opinion at 16.

When a homeowner is subjected to a warrantless search, it does not soothe his outrage nor lessen the gravity of the invasion of his privacy to know that the search is for a suspected misdemeanant rather than for some piece of property. The Fourth Amendment protects the citizen's right of privacy; an invasion of that right is not eased by the presentation of an arrest warrant for a stranger.

Second, the Fourth Amendment preference for judicial rather than police determinations of probable cause for searches of homes is no less forceful because the intended search is for persons rather than for things.[11] The

[11] As this Court pointed out in Coolidge v. New Hampshire, 403 U.S. 443 (1971), police entry into a home to effect an arrest is "a very substantial intrusion." 403 U.S. at 477.

requirement of a search warrant is no mere formality. It reflects the important Fourth Amendment policy that "the informed and deliberate determinations of magistrates empowered to issue warrants...are to be preferred over the hurried actions of police officers...." *United States v. Lefkowitz, supra,* at 464. The Fourth Amendment commands that judicial officers rather than police officers make the determination that there exists probable cause for the search of a particular home. In doing so, the Amendment neither makes nor supports a distinction between searches for persons and searches for objects.

Once it is grasped that the issuance of an arrest warrant is unrelated to any judicial determination that an accused is at a given place, it becomes evident that the legality of the search for the person named in the warrant is to be determined by established principles. An arrest warrant embodies a judicial determination that there exists probable cause for the arrest of the person named therein; it reflects no judgment whatsoever on the issue of where the suspect may be found. The determination of a judge or a magistrate that there is probable cause to arrest a particular individual does not satisfy the Fourth Amendment requirement that, absent exigent circumstances, a search of particular premises must be based upon the determination of a judge or magistrate that there is probable cause to believe that the object of the search is within the premises to be searched.

A rule such as the one advocated by defendants, which would dispense with the search warrant requirement, simply cautioning a police officer not to enter dwellings without probable cause, offers only illusory protection. The manner in which most police departments maintain records of their warrantless searches and seizures suggests that there are no records available to them comparable to the sworn statement of facts known to an officer

and asserted to justify that officer's belief that the object of his search is in a stated premises, such as would be required to obtain a search warrant. *See Aguilar v. Texas,* 378 U.S. 108 (1964). With no adequate record of the basis for the policeman's actions, there is scant likelihood that those actions could be reviewed effectively by a court, or even by the policeman's superior officers, were they so inclined. A rule such as the one the police advocate truly leaves the privacy of each citizen's home "in the hands of every petty officer."

A rule allowing warrantless searches for persons has, moreover, an enormous potential for abuse by police seeking to nullify the requirement of a warrant to search for goods. A rule such as this will surely tempt the police (and there is evidence in this case that the officers did so) to search for contraband under the guise of a search for a person. *Jones v. United States, supra,* involved just that problem, and the majority and dissenting opinions illustrate the difficulty courts will have in sorting out the officer's motives when police search without warrants naming the place to be searched. This rule also facilitates selective and discriminatory disregard of the probable cause standard, as for example, where the police consider the crime particularly heinous, or where the homes to be searched belong to less privileged citizens or to people who are politically unpopular. *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *Lankford v. Gelston,* 346 F.2d 197 (4th Cir. 1966).

The search warrant rule is not blind to the exigencies of day-to-day police practice. Exceptional circumstances, such as "hot pursuit", or actual sight of a felon in the premises, are recognized as justifying failure to obtain a search warrant. But mere delay or inconvenience to police officers has never excused the necessity of obtaining a search warrant. *Johnson v. United States, supra,* at 15.

If the basic policy of the Fourth Amendment is to be served, then the citizen's right of privacy in his home must be protected by a requirement that police officers obtain warrants, under oath and upon a showing of probable cause, "particularly describing the place to be searched" before entering the homes of presumptively innocent third parties. The Amendment literally specifies that this be done, and the reasoning of this Court's decisions supports such a conclusion. Dispensing with this requirement would bring into being precisely the relationship between citizens and their government that the Framers drafted the Amendment to avoid. "Zealous officers" engaged in "the often competitive enterprise of ferretting out crime," in Justice Jackson's words, could routinely decide without the intervention of any judicial officer when the privacy of a citizen's home is to be violated. A similar state of affairs led to the enactment of the Fourth Amendment, and if history and experience teach us anything, it is that the mistakes of the past should not be repeated.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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